Visia Finance Bhd v Menang-SK Brothers Enterprise Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-1567-92
SITI NORMA YAAKOB J
12 AUGUST 1993

Contract *— Terms — Incorporation by reference — Whether letter of offer incorporated into main agreement — Whether notice of termination given under terms of main contract or letter of offer — Whether notice valid*

Civil Procedure *— Summary judgment — Triable issue — Whether rebate should be given as payment of moneys due under contract were accelerated because of filing of action*

The plaintiff entered into a block discounting master agreement ('the agreement') whereby the plaintiff had purchased the first defendant's contractual rights in 45 blocks of hire purchase agreements between the first defendant and various hirers. Under the agreement, the first defendant, as agent of the plaintiff, was obliged to collect all instalments due from the various hirers under the hire purchase agreements purchased by the plaintiff and to remit them to the plaintiff. After one year, the first defendant defaulted and the plaintiff sent a notice to the first defendant to terminate the agreement forthwith and sued the defendants. The second defendant was the guarantor of all losses sustained by the plaintiff by reason of entering into the agreement. In proceedings for summary judgment under O 14 of the Rules of the High Court 1980, the issues were: (i) whether the agreement was lawfully terminated as the requisite notice of 30 days under s 7.01 of the agreement had not been given by the plaintiff; and (ii) whether the defendants were entitled to a rebate of the payments due under the agreement because of the accelerated payment as a result of the filing of the suit.

Held, dismissing the plaintiff's application for summary judgment:

(1) The notice of termination was not issued under s 7.01 of the agreement but under s 1.22 of the plaintiff's letter of offer which enabled the plaintiff to terminate the agreement immediately by written notice upon breach of any term or condition by the first defendant. The letter of offer was deemed to be incorporated into the agreement and to constitute part of its terms by virtue of s 8.04 of the agreement. Since the ground for termination was the first defendant's breach, the termination was valid.

(2) However, since the question of the rebate in payments had become an issue, the application for summary judgment was dismissed.

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian induk diskaun blok ('perjanjian itu') di mana plaintif telah membeli hak kontraktual defendan pertama di dalam 45 blok perjanjian sewa beli di antara defendan pertama dan berbagai penyewa. Di bawah perjanjian itu, defendan pertama, sebagai agen plaintif, berkewajipan untuk mengutip semua bayaran ansuran yang kena dibayar daripada berbagai penyewa di bawah perjanjian sewa beli yang dibeli oleh plaintif dan menghantarkannya kepada plaintif. Selepas satu tahun, defendan pertama telah memungkiri perjanjian itu dan plaintif telah menghantarkan satu notis kepada defendan pertama untuk menamatkan perjanjian itu dengan segera dan mendakwa defendan-defendan. Defendan kedua ialah penggerenti semua kerugian yang akan dialami oleh plaintif akibat mengikat perjanjian itu. Di dalam prosiding untuk mendapatkan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980, isu yang timbul ialah: (i) sama ada perjanjian itu telah ditamatkan secara sah kerana notis selama 30 hari yang perlu diberikan di bawah s 7.01 perjanjian itu tidak diberikan oleh plaintif; dan (ii) sama ada defendan berhak menerima rebat ke atas bayaran yang kena dibayar di bawah perjanjian itu oleh sebab bayaran itu akan dipercepatkan kerana tindakan ini difailkan.

Diputuskan, menolak permohonan plaintif untuk penghakiman terus:

(1) Notis penamatan itu tidak dikeluarkan di bawah s 7.01 perjanjian itu tetapi di bawah s 1.22 di dalam surat tawaran plaintif yang membolehkan plaintif menamatkan perjanjian itu dengan segera melalui notis bertulis apabila berlakunya kemungkiran sebarang terma atau syarat oleh defendan pertama. Surat tawaran itu disifatkan sebagai digabungkan ke dalam perjanjian itu dan membentuk sebahagian daripada termanya mengikut s 8.04 perjanjian itu. Oleh kerana alasan bagi penamatan itu ialah kemungkiran oleh defendan pertama, penamatan itu adalah sah.

(2) Bagaimanapun, oleh kerana soalan mengenai rebat dalam bayaran telah menjadi suatu isu, permohonan untuk penghakiman terus itu ditolak.]

[*Editorial Note*: The plaintiff's appeal to the Federal Court was heard on 5 October 1994. The Federal Court (comprising Edgar Joseph Jr, Chong Siew Fai and Wan Adnan FCJJ) dismissed the appeal with costs to be paid to the first and second defendants.]

Legislation referred to

Rules of High Court 1980 O 14

Rajes Raghavji (*Paul Chong & Kraal*) for the plaintiff.

Teh Meng Teck (*S Sivaneindiren* with him) (*Cheah Teh & Su*) for the defendants.

Cur Adv Vult

Siti Norma Yaakob J: The plaintiff's cause of action against the first defendant is on a block discounting master agreement dated 9 July 1991, whereby the plaintiff purchased the first defendant's contractual rights in 45 blocks of hire purchase agreements entered into by the first defendant with various hirers. Under the master agreement, the first defendant as the agent of the plaintiff is obliged to collect all instalments due from the various hirers under the hire purchase agreements purchased by the plaintiff and to remit the same to the plaintiff. For the first year the first defendant was able to meet this obligation but after July 1992 it defaulted, resulting in the plaintiff sending a notice dated 17 September 1992, to the first defendant terminating the facility.

The second defendant is sued as a guarantor and indemnifier under a letter of guarantee and indemnity, also dated 9 July 1991, whereby it agreed to keep the plaintiff indemnified against all losses which the plaintiff may sustain or incur by reason of entering into the master agreement.

In proceedings for summary judgment under O 14 of the Rules of High Court 1980, two issues were raised:

(1) whether there has been a lawful termination of the master agreement.

(2) whether the defendants are entitled to a rebate by the filing of this suit.

Under s 7.01 of the master agreement, any party to the agreement may at any time by giving 30 days written notice terminate the agreement. In this instance, para 4 of the plaintiff's notice dated 17 September 1992 terminated the agreement forthwith and clearly there has been non-compliance of s 7.01 regarding the length of notice. However, the letter of termination is purported to be issued not under s 7.01 but under s 1.22 of the plaintiff's letter of offer dated 16 May 1991, and s 8.04 of the master agreement.

Section 1.22 of the letter provides that the plaintiff reserves the right at any time to terminate the facility by giving one month's notice in writing to the first defendant. However, should there be any breach of any term or condition on the part of the first defendant, the plaintiff reserves the right to terminate the facility immediately by written notice.

Under s 8.04 of the master agreement, the plaintiff's letter of offer which has been duly accepted by the first defendant shall be deemed to be incorporated in the master agreement and to constitute the terms and conditions of the master agreement.

Since the ground for the termination of the facility is the first defendant's default in collecting and remitting all sums due to the plaintiff, it would appear that the termination of the facility forthwith is well within the terms and conditions of the master agreement and to that end, the notice has been rightly given and the termination validly made.

It is also the defendant's contention that by demanding for all sums due under the master agreement, the plaintiff is in fact asking for future

payments to be made immediately. As this amounts to the acceleration of payment, the defendants are entitled under s 7.03 of the master agreement to a rebate to be calculated by the plaintiff's current rate or such other rates as stipulated by the plaintiff. As no such rebate had been given, the amount claimed by the plaintiff is incorrect. No satisfactory explanation is given by the plaintiff whether the defendants are entitled to a rebate other than to state that rebate can only be given if there had been payments received by the plaintiff pursuant to its letter of demand dated 11 November 1992, issued under s 7.03 of the master agreement inviting the first defendant to repurchase the hire purchase agreements discounted by the first defendant. Since no payment had been received, there is no rebate.

Reading s 7.03 of the master agreement, there is no mention that rebate is only available if there had been an acceleration of payment. All that it states is that the consideration for the first defendant repurchasing the hire purchase agreements is a sum equivalent to the total purchase price which remains unpaid at the date of termination, all other charges due and payable less a rebate, if any, for the acceleration of payment.

Since the question of rebate has become an issue, I had accordingly dismissed the plaintiff's O 14 application with costs.

Application dismissed.

Reported by Anne Khoo